United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2255

United States Court of Appeals

For the Second Circuit.

In the Matter of the Arbitration between INTSEL CORPORATION,

Petitioner-Appellee,

-against-

M.W. ZACK METAL COMPANY,

Respondent-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

Appellant's Brief

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Sec. 4-*****The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Sec. 10-In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

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DOMKE, COMMERCIAL ARBITRATION, p. 307

Here the issue is not so much that a determination of the arbitrator was against the established law or firm legal principles but rather that an unjustified result, under the circumstances, was reached.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

In the Matter of the Arbitration between INTSEL CORPORATION,

Petitioner-Appellee,

-against-

M.W. ZACK METAL COMPANY,

Respondent-Appellant.

APPELLANT'S BRIEF

Docket No. 74-2255

STATEMENT OF ISSUESFOR REVIEW

1. May an arbitration award be made lawfully when it is against the undisputed, conceded and admitted facts; there are no disputed facts which might have supported the award, and, the contract provides that it shall be construed in accordance with the laws of the State of New York?

2. Does Section 10 of the Federal Arbitration Act provide a remedy for a party losing at arbitration under the circumstances mentioned in statement 1 above?

3. If on the motion to vacate the award the losing party shows proof that the undisputed, conceded or admitted facts entitling him to the award under the laws of the State of New York were before the arbitrator, may the district court resort to conjecture and surmise to

confirm the award on the theory that the arbitrator's award may not be disturbed for errors of fact or law, or is the movant entitled to a trial of his claims to the remedies available under said arbitration act, if the disputed facts before the district court raise valid issues of the fact.

4. Were the events occurring on the arbitration as recited by the losing party sufficient to prove the partiality of the arbitrator to entitle him to vacature of the award?

5. In the final analysis, wasn't the losing party deprived of a fair trial by the way the arbitration was conducted and the way the court approached Zack's claims on the motion to vacate.

STATEMENT OF THE CASE

The parties will be referred to as Intsel and Zack to avoid confusion. Intsel having undertaken with Zack at a stipulated price to fabricate aluminum tubing required by a Zack customer in the performance of the latter's contract with the government, demanded arbitration seeking the contract price for the goods. Zack contending that the sales contracts had been breached by petitioner for failure to deliver pursuant to contract and that they had been superseded when the parties

had agreed when the goods arrived two months later, that Zack should take in the goods, free, warehouse them, and sell them for Intsel's account, and further contending that the facts of this superseding contract were undisputed and admitted, it demanded that the petition should be dismissed. Also Zack contended that under the laws of the State of New York, the contract giving the arbitrator power to settle disputes had been replaced by a contract that had no arbitration clause. The arbitrator awarded Intsel the contract price.

The district court confirmed the award, and denied the cross-motion to vacate it. This appeal followed. The chief point involved is whether the award made was an excess of power of the arbitrator or whether the arbitrator made errors of facts and law.

STATEMENT OF THE FACTS

Zack was a broker of metals and metal products, buying and selling as occasion demands(12,14).* Intsel, too, is in the same business but it is a part of the Pechiney group of Companies of France, and is their representative at New York (12,23,24). Respondent is located in the Detroit area (23). Its customer for the

* References are to pages of appendix unless otherwise identified.

tubing was Fox Manufacturing Company of Detroit (14, 23). Intsel and Zack have been buying and selling to each other for a long period of time (12).

In 1968, Zack got an inquiry from Fox for an aluminum tube it needed for a Government contract (12). Zack asked one Krasnov at New York to get prices (23). Krasnov approached Intsel to inquire if one of their mills could fabricate the tubing and at what price (23). After negotiations and a few months later, Intsel and Krasnov agreed upon a price and an order was agreed upon for 40,000 pounds of the tubing in four sizes, to be built according to specifications (24, Ex. A to Pet.) On January 7, 1969, Zack issued a written confirmation of the purchase (64,70) and on January 13, 1969, Intsel issued a written sales confirmation to Zack (Ex. A to Pet.). This was the first contract of the parties. Altogether there were three purchases and sales contracts made. It became apparent in connection with the first order that the specifications were not enough to enable the mill to produce the tubing. A sample was asked for (14,24). Krasnov got the sample from Fox and turned it over to Intsel who passed it on to its mill (24).

It appeared on the arbitration that Intsel had actually contracted with a mill in the Pechiney group to purchase what it had agreed to sell to Zack, but Zack was not aware of that relationship, not being privy to it

(Zack's Ex. 2, 20, 81). With sample in hand, Intsel and Zack agreed upon a trial order of 10,000 pounds instead of the 40,000 pound order (15,24). A writing was issued by Intsel and offered into evidence on the arbitration confirming the reduction of the order to 10,000 pounds (15,24). That 10,000 pounds was produced, shipped, and found satisfactory and it was paid for (15, 24). After that in June 1969, Zack purchased 55,000 pounds of different size tubing with delivery date for 15,000 pounds, as soon as possible, the balance to be shipped and delivered at Detroit during September 1969 (15,25, Zack's Ex. 3). Zack's purchase order is dated June 18, 1969 (Zack's Ex. 3). Intsel accepted the order and sent its written confirmation dated June 23, 1969 to Zack (117). Also, Intsel sent Zack a copy of its purchase confirmation to its mill (Zack's Ex. 3). This purchase and sale in June 1969 was the second contract of the parties.

Zack's copy of Intsel's mill confirmation states that the four items of the January purchases were either delivered, cancelled or transferred to the June contract.

In mid-July 1969, Zack made another purchase for Fox's use in its government contract (17,25,41,42). This was 10,000 pounds of aluminum rods. Zack's purchase

order is dated July 23, 1969 (Zack's Ex. A). This order asked for October delivery but as the rods were needed by Fox for the tubing already on order, further negotiations produced an amendment to ship the rods in September along with the tubing (17,25,42). A slightly higher price than as ordered was agreed upon (25). Intsel issued its confirmation of sale and sent it together with a copy of its mill confirmation for the rods to Zack (Ex. 2 to Pet.). These confirmations agree to September delivery at Detroit. Zack's July 23 order and Intsel's confirmation of August 7, 1969 make up the third contract of purchase and sale.

On the back of each confirmation are clauses 8 and 9 which provide for the application of New York law to the contract and for arbitration respectively. Clause 8 reads as follows:

> "This agreement shall be construed in accordance with the laws of the State of New York."

Zack does not dispute that clause 9 calls for arbitration.

After the third sale, it was noticed that the 15,000 pounds of the ~~July~~ June 18 order which were to be shipped as soon as possible had not been shipped (25). September close at hand, Krasnov telephoned Intsel and inquired of Mr. Mernick of Intsel about delivery (17,18, 25). Mr. Mernick said he would find out (25,26). Many telephone conversations were had by Krasnov with Mr.

Mernick in the month of September about delivery, but a shipping date could not be had (18,25,26). In the last week of September, Fox was told by Zack that he had not been given a shipping date by Intsel (18,26). Fox cancelled its contract with Zack and covered himself elsewhere (18,26). Zack cancelled with Intsel (19,26). Intsel offered no testimony on the arbitration that this cancellation had not occurred.

Late in November, 1969, Zack received letter advices from Intsel that the aluminum tubing and rods were arriving in Detroit later that month in three shipments on board three vessels (12,18,27,45,81,89,90). Mr. Zack told Mr. Besso of Intsel that the contracts had been cancelled in September, that Fox had cancelled with him and that he no longer had a customer for the goods and that he could not accept the delivery (89,90). Mr. Besso asked Mr. Zack if he could sell the goods in the Detroit area (81,89,90). Zack said he would try (81). All right Mr. Besso said take the goods into your warehouse, free, and sell them for our own account (81,89,90). Mr. Zack agreed. Delivery orders were sent to Zack and on or about December 11, 1969, he caused the goods to be picked up and put into his warehouse. Accompanying the arrival advices were invoices for the goods stating that payment was cash upon delivery (Zack's Ex. 7). An assistant of Mr. Besso's, a Mr. Romano, caused the goods to be delivered

without payment (81). This was the fourth agreement made respecting these goods. The goods could not be sold. They remained in Zack's warehouse even through the hearing and are there now.

On March 31, 1971, Intsel sent its first bill for the contract price (87). Yet the parties had agreed to rescind the sale more than sixteen months before. Mr. Fifield had entered the picture and he would not take the goods back and eventually the arbitration was demanded and had.

The arbitrator awarded the contract price but said that he was acting under the contracts of January 13, 1969 and August 7, 1969 (Ex. C to Pet.). These were dates of Intsel's confirmations of the January and July purchases. The arbitrator had nothing to say about the June purchase. Yet that was the second contract and Intsel's confirmation of June 23, 1969 expressly terminated the January purchase.

Intsel moved to confirm the award. Zack cross-moved to vacate the award. Zack's ground for vacature was the partiality of the arbitrator in various ways stated and because he had acted in excess of his powers. Zack bulwarked its application to vacate with a recitation of the facts proving the making of the four contracts received above, and the fact of cancellation in September 1969, all of which facts were undisputed or conceded or

admitted at the arbitration (21,22,40,41,42,44,81,82, 95). There were no disputes arising under the contracts which had the arbitration clause (16,87,88,89,90,98). Nor was the arbitrator's award upon the January contract proper because it was undisputed and it appears by Intsel's own writings that that contract had been cancelled, transferred or performed. Also Zack alleged that the arbitrator was obliged to apply New York law but in making the award to Intsel instead of to Zack he had ignored it. Also Zack had said that the oral agreement to terminate the purchase and sale contract of June and July and to store and sell the goods for Intsel's account was a new contract that ruled the relations of the parties; that according to New York law such new relationship put an end to the prior written contracts (Zack's Memo, Ex. 2 to Cataldo aff.). Zack submitted a memorandum of New York law citing U.C.C. 2, 601 and 602 and Stone v. Bein, 176 N.Y.S. 25, 26. No questions under this oral contract were submitted to the arbitrator for resolution. The fact of the contract and its terms were undisputed. In fact, they should be deemed admitted because neither Mr. Besso nor Mr. Romano were called to testify (12). Yet, at the time of the hearing and even now both of them are employed by Intsel (12,44). Instead, Intsel called only a Mr. Fifield who by his own admission stated that he had no personal dealings of these matters

until long into 1970. He stated also that Mr. Besso was the executive vice president of Intsel and superior to him (19,20,22,27,30).

Of course, the making of the three purchase and sales contracts are in writing; they speak for themselves and there were no disputes about their meaning. Whether Intsel's confirmation of the June purchase terminates the January contract is a question of law. Krasnov's testimony that he had cancelled the purchase for Intsel's failure to deliver in September remains uncontradicted. The fact that the three ships arrived in late November instead of September is a conceded fact (29). Also, there was no proof of any modification of the agreement extending the time of delivery (19,30). Intsel made no claim that there was such a modification (19,30). When the arbitrator said he awarded on the January contract, he manifested a complete disregard of the facts and law. When he awarded on an admittedly terminated contract, he failed to note that his powers had also been terminated and he manifested a disregard for the law of New York. These were placed before the district court on Zack's motion to vacate but the district court had nothing to say of them. Instead it confined its decision to a discussion of peripheral issues which Zack believed in their totality proved bias or partiality and misconduct on the part of the arbitrator and the court

treated of them separately and found them insufficient.

The court also stated that Intsel had claimed that Zack had breached the contract by not paying the contract price. Yet it failed first to find that Zack had an obligation to pay the price. The arbitrator failed in that respect too.

Also the district court's view that arbitrators' interpretation of the facts and the law may not be reviewed is no answer to whether the award is in manifest disregard of the contract powers of the arbitrator under the contract appointing him or under the law he is required to apply. The latter is a ground for vacating the award; it cannot be ignored without committing error. The court decided to confirm without considering the facts including the terms of the contract and what the parties did in respect thereto. Nor may the law of New York be disregarded when considering what the contracts say and what the parties did as shown by undisputed facts. Here both the substantive and evidentiary law of New York was not applied by the arbitrator and the question was not reviewed by the court. An award is not an award when it is not the result of an honest opinion of how a dispute should be resolved. Where there are no disputes and the facts are undisputed, conceded or admitted to ignore them and to decide against them and against the command of the contract that the arbitrator apply New

York law, the party disfavored did not have the minimal fair hearing as guaranteed by our Federal Constitution. Zack might as well have talked to a wall, as to have tried to offer the proof of its case according to New York law to an arbitrator who didn't listen. An award made in this fashion has to be wrong. Why didn't the district court understand this serious aspect of the case.?

POINT I

ZACK IS ENTITLED TO A VACATURE OF THE AWARD BECAUSE THE ARBITRATOR EXCEEDED HIS POWERS IN OVERLOOKING THE UNDISPUTED, CONCEDED AND ADMITTED FACTS PROVING THAT THERE WERE NO DISPUTES UNDER THE CONTRACT PROVIDING ARBITRATION AND UNDER NEW YORK LAW ZACK WAS ENTITLED TO THE AWARD.

Whether the relations of the parties are controlled by one contract or another, the question is not to be decided by the arbitrator. Section 4 of the Arbitration Act specifically provides that an arbitrator may not arbitrate until the court has found that there is a contract which may be arbitrated. Where an arbitrator proceeds under a contract which does provide for arbitration and there are no disputes under that contract but the subject matter was ruled by a later contract which does not provide for arbitration, the arbitrator cannot assume the power to decide the issues under the later contract.

Our Supreme Court in Wilko v. Swan, 346 U.S. 427, and in the Steelworkers trilogy, United Steelworkers of America v. American Mfg. Co., 363 U.S. 564; United Steelworkers v. Warriors & Gulf, 363 U.S. 576; and United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 592, laid down the principles under which arbitration awards, whether of industrial disputes or of a commercial transaction should be considered. They said that awards under the Labor Management Relations Act should be considered final. The act was passed to settle industrial strife and the decision must be left to the arbitrators. The courts ought not to sit in review on questions of fact and of law; see page 577. On page 578, however, speaking about commercial arbitration, the court said that the principles settled in Wilko v. Swan, that an arbitrator may not disregard the law he is required to apply or the limits of the contract disputes referred to him are not affected by the new decisions because "commercial arbitration is the substitute for litigation." At page 568, the court said that in a commercial arbitration, an arbitrator may not exceed his contract powers explaining, "where a party is seeking arbitration, he must show whether he is making a claim on its face that is governed by the contract." At page 595, the court said of an award, "Nevertheless, an arbitrator is confined to interpretations and applications of the collective bargaining

agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources. Yet, his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

In Wilko v. Swan, the Supreme Court divided on the question of whether a customer's right to recover against a stockbroker under the provisions of the Securities Act could be referred to an arbitrator because the margin agreement contained an arbitration clause on the back of it. The majority ruled that it could not because that Securities Act required its enforcement by court process. Yet, the question was raised about Section 10 of the Arbitration Act and whether it would protect the customer. The whole court felt that the Securities Act was law which if disregarded would call for a vacature under the Arbitration Act. All opinions written for and against the main question were unanimous, however, on this question that if an arbitrator would not apply the law of the Securities Act, the award would be vacated for an excess of power.

The Supreme Court has not overruled or modified the principles it made manifest in Wilko v. Swan or in the trilogy of the United Steelworkers cases. Those

principles are the law today.

The Third Circuit said in Swift Industries, Inc. v. Botany Industries, Inc., 466 F.(2) 1125, that insofar as the rule that arbitrators must stay within the limits of the contract authorizing them to act is concerned there is no difference between the industrial and the commercial arbitration. Both types of arbitration must observe the provisions of the contract which is the source of the arbitrator's power and which, at the same time, describes the limitation upon that power. In fact, the last case in the trilogy; viz; United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 592, is cited frequently in both types of arbitration. The New York courts have cited the case on the point that an arbitrator's power to decide is limited by the terms of the contract appointing him; see In the Matter of National Cash Register Co. (Wilson), 8 N.Y.(2) 377, where Chief-Judge Fuld was moved by the Steelworkers case to say that an excess of power is "making a completely new contract for the parties." Also, see M.V. Gervain v. Robilotto, 40 A.D.(2) 1060, where the Appellate Division refused to uphold the award as completely irrational to the contract calling for arbitration.

In the application of this rule, a court must distinguish awards that exceed the power of the

arbitrator, from the rule that awards may not be set aside for errors of fact or law. In the latter case, a dispute arises as to what a contract term means or what were the true events of performance. The distinction was well made in Swift Industries, Inc. v. Botany Industries, Inc., supra, and its ancestor, Ludwig Honold Mfg. Co. v. Fletcher, 405 F.(2) 1123. There is nothing to the contrary in the two cases cited by the court below, viz; Amicizia Societa Navigazione v. Chilean, 274 F.(2) 805 and Saxis S.S. Co. v. Multifact etc., 375 F.(2) 577.

Query? Was the award here the result of an interpretation or an excess of the powers extended to the arbitrator under the contract appointing him? Immediately, we are faced with finding which contract of four are to be considered by the arbitrator. If only the first three contracts contained arbitration ~~claims~~ clauses, could he exercise dominion over the fourth if there was no agreement to have him decide the rights of the parties under it. What if one or all three of the written agreements were not subsisting? Could the arbitrator ignore the undisputed, conceded or admitted facts that they no longer existed but there was a novation superseding all three writings? What effect was the arbitrator to give to the contractual term in the written contracts that New York law was to apply? These are questions that are basic to

this appeal. They should have been considered by the arbitrator but were not. They should have been considered by the court but were not.

a. What effect should the clause requiring the written contracts to be construed by New York law, have?

First, the New York law clause is in all three written contracts and it is a term of the contract which is binding upon all the parties and the triers of the facts alike, In the Matter of Int'l Assoc. of Machinists (Cutler-Hammer, Inc.), 271 App. Div. 917. New York law states two principles which are pertinent here. One is that undisputed evidence of a party if reasonable and fair is binding and conclusive upon the court; see Hull v. Littauer, 160 N.Y. 569, and Woodson v. New York City Housing Authority, 10 N.Y.(2) 32. The rule is the same in the Federal courts. See Bogardus v. Comm'r., 302 U.S. 34; Wener v. C.I.R., 242 F.(2) 938; and Rule 43(a) F.R.C.P. Also, see the comment of Judge McAllister in Ballou v. U.S., 370 F.(2) 659, at pp. 666-678.

Admitted or conceded evidence is without question binding upon the court, see Matter of Term. Aux. Mar. (Winkler), 6 N.Y.(2) 294,300; Matter of Int'l Machinists (Cutler-Hammer), supra. Where there are no disputes under the contract calling for arbitration, there is nothing to arbitrate. Alpert v. Administration

Knitwear Co., 304 N.Y. 1; Matter of General Electric Co. (Electric etc. Workers), 300 N.Y. 262. A form of admission is where one party testifies to a fact, and the other party fails to take the stand to refute it. Whether it is called an admission or a failure to carry forward, the burden of persuasion, (see McCormick on Evidence, Chapter 36; Richardson on Evidence, 8th Ed., Section 299,300) the result is the same. It is proof of a fact which binds him and the court. See also Young Foundation Corp. v. A.E. Ottaviano, Inc., 29 M.(2) 302, aff'd 15 A.D.(2) 517; and Skicki v. Diesel Construction Co., 56 M.(2) 955, aff'd 29 A.D.(2) 1050; and 2 Conrad, Modern Trial Evidence, Section 1238.

As seen above, Zack testified that he and Mr. Besso of Intsel agreed to rescind all prior contracts and they made a new bargain which was carried out that Zack was to take the goods in, free, and to warehouse them and sell them for Intsel's account (22). There has been no evidence offered by Intsel refuting this new contract. Mr. Besso who was and is available did not deny making the new arrangement as a means of mitigating his own loss. Consequently, failing to credit Zack's testimony with the power to put an end to the written contract and the cessation of the power of the arbitrator to act under them, the arbitrator did not apply the law of the contract.

Also, the law of New York provides that the parties may make an oral contract which rescinds the prior written contracts and creates a new relationship between them with respect to the goods, see 17 Am. Jur. 2nd, Contract, Section 459; Reichel v. Standard, 225 App. Div. 628, aff'd 254 N.Y. 86; Bandman v. Finn, 185 N.Y. 508; Nassoit v. Tomlinson, 148 N.Y. 326; and the above cited U.C.C. 2.601, ~~and~~ 2.602 and 2.604, and Stein v. Bein, one 176 N.Y.S. 25,26. Such flagrant disregard of New York law is what has been proscribed by our Supreme Court in Wilko v. Swan and in the Steelworkers cases. Under the only subsisting contract of the parties the arbitrator had no power to decide any questions that arose after December 1969. That Intsel unilaterally changed its mind in 1971 about the deal made in December 1969 did not revive the prior written contracts. They were ended and so was the power of the arbitrator to decide. Besides, there were no disputes under the written contracts. The obligation to pay was conditioned upon delivery of the goods at Detroit in September. The ships physically arrived at Detroit late in November. In the meantime, Krasnov said, again without contradiction, that he had cancelled in September.

Again the evidentiary and substantive law of New York forbade a finding that Zack was lawfully obligated to pay the price under the written contracts. The

court's reference to Oinoussian Steamship Co. v. Sabre Shipping Corp., 224 F. Supp. 807, and to Eastern Marine Corporation v. Fukaya Trading Co., 364 F.(2) 80, 85 are two cases which do not treat with undisputed or conceded evidence of cancellation or termination but/treat of disputed facts before the arbitrator. The failure to observe this difference is the error in the district court's decision.

b. The award manifested a disregard of the law.

The award states that it is made pursuant to the powers granted the arbitrator by the January 13, 1969 and August 7, 1969 contracts. It did not refer to the written contract of June 1969 or to the oral agreement of December 1969.

Respecting the contracts mentioned by the arbitrator, Intsel attached to the petition to confirm its copies of each document. Exhibit A, which is identified as the January 13, 1969 contract. It is conceded that that paper is only the confirmation of Zack's purchase of January 7, 1969, which is Intsel's Exhibit G in its papers opposing vacature of the award. The two together made the first contract of purchase and sale. It is also conceded that Intsel cancelled, performed or transferred this order to the second contract of purchase and sale; see its mill confirmation of June 23, 1969, which is Exhibit B to Zack's affidavit.

By operation of its terms, Intsel's document effectively put an end to the January purchase and sale contract. At the same time, its confirmation of sale of the same date/(117) together with Zack's purchase order of June 18, 1969 (Zack's Ex. 2) made this second order the only contract for the purchase and sale of tubing between the parties. The last purchase and sale initiated by Zack's order of July 23, 1969 was for rods, not tubing, a fact overlooked by the court below.

Yet, we see the arbitrator awarding pursuant to a contract plainly superseded or cancelled by Intsel. When this fact is considered with the aribtrator's failure to mention the June contract, Zack's purchase orders, the cancellation, the oral contract of rescission of December 1969, and the fact that Intsel's first invoice for the contract price was dated March 31, 1971, more than sixteen months after the rescission during which time Zack's sales efforts for Intsel's account had proven futile to move the goods, one must conclude that the arbitrator turned a deaf ear and was blind to the basic facts of the case which is what arbitrary decisions are made of. Just the same, the award itself shows proof of its disregard of the law.

Intsel tried to excuse this reference to the wrong contract by saying that its file number 50240 was the same for both the January and June contracts, but

award does not refer to the file number but refers only to the date of January 13, 1969.

The district court excused the arbitrator by saying (113) that his reference to the contract of January 13, 1969 is merely a reference to the "Arbitration Agreements entered into by the above parties." The court does not recite the whole statement of the arbitrator and the court's excerpt somehow would lead one to believe that the arbitrator's error was excusable. Yet, the arbitrator actually awarded pursuant to the contract of January 13, 1969 and such action is not excusable. Nor is the court's action excusable.

In any view of the arbitrator's award, it manifested by its own terms, a disregard of the law and of the issues, and it was by the perverseness of the arbitrator, a manifest disregard of the relations of the parties and the issues before him.

POINT II

IF ANY ISSUE OF FACT WAS VALIDLY RAISED BY INTSEL ON ZACK'S MOTION TO VACATE BECAUSE THE UNDISPUTED, CONCEDED OR ADMITTED EVIDENCE COMPELLED A DISMISSAL OF THE PETITION UNDER NEW YORK LAW, THE COURT SHOULD HAVE DIRECTED A TRIAL THEREON.

If such an issue was validly raised, it was error for the court to decide in favor of Intsel on affidavits; see Heyman v. Potterberg's ex., 101 F.(2)

262; and Campbell v. American Fabrics Co., 168 F.(2) 959. Judge Learned Hand said in the Heyman case that where an issue of fact was raised in the district court about what the facts were before the arbitrator, the court should direct a trial. In Campbell, the court said that the issue of whether the arbitrator had exceeded his authority that was raised on disputed facts before the court could only be resolved by a trial. Furthermore, Rule 81(a) F.R.C.P. expressly makes the Federal Rules applicable to motions under Section 10 of the Arbitration Act. Our Supreme Court said in New Hampshire Fire Insurance Co. v. Scanlon, ~~326~~ 362 U.S. 404, that the Federal Rules of Civil Procedure apply to all forms of civil actions. A trial rather than summary proceedings should be had. Of course, Rule 56 permits summary judgments, but not where issues of fact are present.

The claims to the undisputed, conceded and admitted facts by Zack were specific enough. There was no dispute about what the parties did up to and including the making of the novation agreement in December 1969 (22,44,45,81). The arrival of the three ships in November and the fact that Zack would have had to pay cash for the goods on arrival if the contracts were still in force is proven by Intsel's own evidence (22,44,45,81). Even the termination of the January contract is proven by Intsel's writing (Zack's Ex. 2). Only the September

cancellation and the December novation rest upon parol evidence but neither was denied by Intsel. Are these facts now denied by Intsel in its opposing papers to the motion to vacate? None are denied specifically. The only denial is a meaningless charge of distortion, whatever that means (56). Intsel had previously stated that it would not take issue (56) and it doesn't. All the talk by the court of what Schwartz (Intsel) said shows that it believed Schwartz and that Zack's affidavits were not truthful. The court said this about the proceedings on the motion before it, not about the facts and proof presented to the arbitrator. In this respect it erred. The court did interpret the facts submitted to the arbitrator in the two instances. The court said that "Intsel alleged that Zack had breached two contracts" (104). It was wrong in this instance because the necessary predicate to that conclusion would be facts showing Intsel's proper performance of the contracts rendering Zack liable. Where is there any proof submitted in the Intsel affidavit that it had fully performed its contracts making the non-payment of the contract price by Zack a breach of the contract? Zack had shown that the non-payment was a right of Zack's. Intsel did not deny this nor did it allege any facts that would make Zack liable either before the arbitrator or in the court in its affidavit. This court

drew an inference to that effect, but it did so in the face of Zack's claim that the right of Zack to non-payment arose out of the uncontradicted, conceded or admitted fact that the novation agreement had been made and acted upon. If a valid issue were to be raised about whether the new agreement was made, would it not be incumbent upon Intsel to show facts negating it? Actually, Mr. Besso's failure to deny this agreement was an admission that it was made. It would follow then that as Judge Thacher said in Worcester Silk Mills, Inc., 50 F. (2) 966, where an accord and satisfaction of an arbitrable agreement is proven, there can be no disputes to be settled under it for the arbitrator.

The second item is the court's allusion to an amendment to the contract to show sales of 70,000 pounds (113). Zack had stated before the arbitrator that the total contract price for the goods specified in the June and July contracts was $24,000., whereas the award was for $35,253.10 (43,44). Zack also stated that there had been no evidence of any modification of the price or of the quantity ordered (43,44). Hence, the award was erroneous. Intsel said that there was a modification to the quantity to be delivered. It, however, offered no proof of it, or showed that Zack's claim was feigned. An issue of fact was thus presented and it could not be resolved upon affidavits as was done by the court below.

The court and Intsel also took issue with Zack's facts supporting its claim to misconduct which vitiated the arbitration. Below, there appears a short discussion supporting facts to Zack's claim of misconduct.

POINT III

THE MISCONDUCT AND PARTIALITY WHICH ZACK BELIEVED ENTITLED IT TO A VACATURE OF THE AWARD

a. The failure to permit Zack to choose an arbitrator.

It is undisputed that the arbitrator was one picked by Intsel and that Zack had not made any choices of its own. It is also undisputed that Zack requested an opportunity to name arbitrators of the American Arbitration Association but the request was denied on the ground that an arbitrator had already been named and that Zack had defaulted earlier in naming its choices. Zack asked to be excused of its default explaining that the default was that of Detroit counsel, but as soon as New York counsel was appointed, the latter immediately applied to excuse the default, showing that Detroit counsel had defaulted through a pre-occupation of ~~its~~ his own problems and a neglect of the client's needs (12,13,36-38,45). The application was denied. Zack preserved whatever rights it could by calling attention

to the matter to the arbitrator before the hearing had started(38). The arbitrator refused to disqualify himself. The appointment of an arbitrator picked by one side is a circumstance to a consideration of bias or misconduct although by itself it might be insufficient; see San Carlo Opera Co. v. Conley (S.D.N.Y. 1947), 72 F. Supp. 825, aff'd 163 F.(2) 310.

b. The arbitrator and New York law.

Add to this fact, that an affirmation was made by the arbitrator on the hearing that he would follow New York law, but he did not do so (21,22,29,40,46-47).

c. The biased handling of documentary proof.

Add, also, that the arbitrator favored the admission of writings of Intsel in spite of their legal inadmissibility and questioned the admissibility of Zack's writings even though the writing being offered by Zack was an Intsel writing (19,20,21,27,28,29,38, 39). Normally an arbitrator's action in admitting documents into evidence is not reviewable. Here the action is being offered as part of the res gestae to show the partiality of the arbitrator. Also under this heading the fact that Mr. Fifield had untruthfully identified a mill confirmation as Intsel's contract with Zack and it was admitted despite Zack's objection and the plain wording of the Exhibit which was marked

mill confirmation. A mill confirmation, it had been explained by the same Mr. Fifield was Intsel's written confirmation of its purchase from the mill. Alone it would be difficult to say that this untruthful statement was perjurious, but just the same, it was part of the pattern where the arbitrator had allowed into evidence what a court would not and what is worse, he found the award on the basis of one of the documents objected to, viz; the January 13, 1969 document. This document evidences a part of the January agreement which had been superseded so that it was irrelevant. Whereas, Zack offered Intsel's confirmation of sale made on June 23, 1969 in response to Zack's purchase of June 18, 1969, and the arbitrator refused to let it in at first, but allowed it only after arguments were pressed. The action of the arbitrator to Mr. Krasnov and Mr. Zack looked bad. It is being alleged here as part of the res gestae to convince the court that it was evidence of an intent, that Intsel would be heard but not Zack.

d. The badgering of Mr. Krasnov.

The arbitrator had so badgered Mr. Krasnov that Mr. Krasnov who had been at the hearing from its beginning in the morning until late afternoon became so irritated by the arbitrator's badgering that he got up, left off testifying and left the room. The arbitrator had interrupted Zack's counsel who was examining

Mr. Krasnov, to ask Krasnov about clause 3 of the contract. That clause had nothing to do with the case, but it could have had. The arbitrator's tone of voice was hostile. It appeared as just another instance of bias against Zack's case. Krasnov walked off and out of the hearing room without actually finishing his testimony (19,20,30,31,38,39). What further he had to say was that Mr. Mernick's telex to the mill was not what he had promised Krasnov and that Mernick had been told that Zack was only a broker, that time of delivery was expressly stated in the contract, and such time was of the essence (16, 45).

The subject matter causing the arbitrator to interrupt Krasnov's testimony was aimed at eliciting from Krasnov evidence of a modification of the agreed delivery date of September at Detroit. Intsel had not shown any facts on its direct case that the September delivery had been amended by agreement of the parties. Nor had Intsel shown any facts in proof of the excuses for delivery mentioned in clause 3. As it was, Krasnov who was dealing with Mr. Mernick of Intsel when he had cancelled the contracts for Zack, he would have been the one with whom Mernick would have discussed the excuses for late delivery if any had occurred. Krasnov had had no such conversation with Mr. Mernick about excuses for late delivery (19,22, 30,31). It was obvious to Mr. Krasnov that the arbitrator had abandoned his role of impartiality and was entering

the arena of proving a case for Intsel in a manner that Intsel could not do. This is what had infuriated Mr. Krasnov, not the blatant guess of the trial court that "seeing things were going against him, ran to avoid further questioning" (113-114). The court professed to rely upon Mr. Zack's affidavit as the source of this statement. There is nothing in Mr. Zack's affidavit of the sort. Zack was the principal, not Krasnov. Nothing was going against Krasnov except the too partial arbiter.

e. The disregard of the facts.

Finally,there was the arbitrator's disregard of the facts, undisputed, conceded and admitted facts. These are the meat and potatoes of a case. The hard core facts. Zack presented Intsel's writings to prove them. Intsel's direct proof consisted only of Mr. Fifield's testimony which by his own admission was not based on personal knowledge (12,19). His testimony was used to put in evidence of telex messages between Intsel and its mill and to identify papers. The telexes were admitted over objections. He, at first, offered to prove the arbitration agreement not by showing his company's sales confirmation to Zack but by showing his company's purchase confirmation to his mill, which also contained the same clause on the back. He said that the mill confirmation was the same as the sales confirmation

to Zack' (20,27,28). That was untrue (39,40). He later admitted that the mill confirmation was not a paper his company would discuss with Zack (20,28,29). Of the telexes between the mill and his company, he admitted, too, that they would not be discussed with Zack (28,30). With all of this, it remained for Zack to put in the Intsel's sales confirmation (20,28).

There were no disputes regarding the contracts, or the cancellation, or regarding the making of the novation, yet their legal effect was disregarded. A compilation of what evidence was put before the arbitrator is found at p. 40-47. Then there was the award that assumes that a terminated contract required the arbitrator to award a contract price found in a subsequent contract and for a greater quantity of material than was stipulated in either contract. All these reasons put together show that Zack did not get the minimal safeguards to a fair trial. This is the point of this appeal. Zack is entitled to a fair trial even before an arbitrator and to a fair trial of its rights under Section 10 of the Arbitration Act before the district court. Domke in his book "Commercial Arbitration" says at p. 307 that courts ought to distinguish between the principle of confirming an award even if it contained errors of law or fact from an issue posing the question of whether "an unjustified result, under the

circumstances was reached." Chief-Judge Fuld expressed the same concept in National Cash Register Co. (Wilson), supra, when he said that arbitrators may not give the contract a "completely irrational" interpretation such as the making of a new contract. The plain terms of the contract ought to be upheld or the arbitrator will be exceeding his powers; see Glenwood Jewish Center v. Marard Caterers, 39 A.D. (2) 536; and In the Matter of the Arbitration between Vincent J. Smith, Inc. and B.W. Lauri Trucking, Inc., 19 A.D.(2) 763.

Here the mandate of the written contracts was for the arbitrator to apply New York law and to settle disputes. He had no disputes to settle according to New York law but instead of granting award to Zack, the arbitrator granted it to Intsel who at best had breached the contract and then disregarded its obligations under the oral contract to let Zack sell the goods for Intsel's account. The irrationality of the award is manifest.

One word about the court's decision on the misconduct of the arbitrator. It proceeded to take Intsel's account of what happened and in doing so, it relied upon immaterial matters such as the procedures followed by Intsel's counsel in bringing on the arbitration for a rehearing and failing to discuss the specific facts advanced by Zack and whether their total effect was or was not misconduct. It simply ignored Zack's

claims.

CONCLUSION

The order appealed from should be reversed and the award vacated and the petition dismissed altogether or at best to direct arbitration under a new arbiter to be appointed with an opportunity to Zack to name its choices, together with costs.

Respectfully submitted,

ANTHONY B. CATALDO
Attorney for Appellant
ZACK

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 6 day of Nov. 1974 deponent served the within Brief upon Weil, Gotshal + Manges

attorney(s) for appellee

in this action, at 767 Fifth Ave. New York, N.Y.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
6 day of Nov. 1974

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976